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## BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

## COMMISSIONERS

DOCKETED

DEC -5 2006

JEFF HATCH-MILLER, Chairman  
WILLIAM A. MUNDELL  
MIKE GLEASON  
KRISTIN K. MAYES  
BARRY WONG

DOCKETED BY

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IN THE MATTER OF THE JOINT APPLICATION  
OF COMTEL TELCOM ASSETS L.P., VARTEC  
TELECOM, INC., EXCEL  
TELECOMMUNICATIONS, INC., AND VARTEC  
SOLUTIONS, INC., FOR APPROVAL OF A  
TRANSFER OF ASSETS.

DOCKET NO. T-20423A-05-0677  
DOCKET NO. T-03401A-05-0677  
DOCKET NO. T-02584A-05-0677  
DOCKET NO. T-03188A-05-0677

DECISION NO. 69175

OPINION AND ORDER

DATE OF HEARING:

August 14, 2006

PLACE OF HEARING:

Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE:

Yvette B. Kinsey

APPEARANCES:

Jeffrey W. Crockett and Marcie Montgomery,  
SNELL & WILMER, on behalf of Comtel  
Telcom Assets, LP, Vartec Telecom, Inc., Excel  
Telecommunications, Inc., and Vartec Solutions,  
Inc.; and

Maureen Scott, Staff Attorney, Legal Division,  
on behalf of the Utilities Division of the Arizona  
Corporation Commission.

**BY THE COMMISSION:**

On September 25, 2005, Comtel Telcom Assets LP ("Comtel"), VarTec Telecom, Inc. ("VarTec Telcom"), Excel Telecommunications, Inc. ("Excel") and VarTec Solutions, Inc. ("VarTec Solutions") (collectively "Applicants") filed with the Arizona Corporation Commission ("Commission") an application for approval of the acquisition of certain of the VarTec companies' assets by Comtel.

On May 3, 2006, Applicants VarTec Telecom, Inc., Excel Telecommunications and VarTec Solutions, Inc. (collectively, "the VarTec Companies") filed Notice of Completion of Customer Notification in this docket.

1 On May 16, 2006, Applicants filed a Supplemental Application to provide additional  
 2 information to support Comtel's application for a Certificate of Convenience and Necessity  
 3 ("Certificate" or "CC&N") and clarifying that Applicants have no assets in Arizona and that the  
 4 application is a request to transfer customers from the VarTec companies to Comtel.

5 On May 18, 2006, Applicants docketed Comtel's Foreign Limited Partnership Certification.

6 On June 21, 2006, the Commission's Utilities Division ("Staff") filed its Staff Report  
 7 recommending approval of the application with conditions.

8 On June 26, 2006, by Procedural Order, a hearing was scheduled in this matter.

9 On July 17, 2006, Applicants filed a Notice of Filing Affidavit of Publication in accordance  
 10 with the Procedural Order.

11 On August 14, 2006, a full public hearing was held before a duly authorized Administrative  
 12 Law Judge of the Commission at its offices in Phoenix, Arizona. Applicants and Staff appeared  
 13 through counsel and presented evidence and testimony. No members of the public appeared to give  
 14 public comment. Pending late-filed exhibits, all matters were taken under advisement at the  
 15 conclusion of the hearing.

16 On August 16, 2006, by Procedural Order, the Applicants were directed to file updated,  
 17 audited balance sheets for Comtel on or before August 18, 2006 and a copy of its third party  
 18 settlement agreement with Qwest by August 25, 2006. Additionally, the Applicants were directed to  
 19 docket notice of having submitted the financial information by August 25, 2006.

20 On August 18, 2006 and subsequently on August 22, 2006, Applicants filed a Notice of Filing  
 21 of Late-Filed Exhibits.

22 On August 23, 2006, Applicants filed two letters in this docket.

23 On August 25, 2006, Staff filed a Memorandum in this docket.

24 On September 6, 2006, Applicants filed a Response to Staff Memorandum.

25 On September 21, 2006, Staff filed a Staff Notice in this docket.

26 \* \* \* \* \*

27 Having considered the entire record herein and being fully advised in the premises, the  
 28 Commission finds, concludes, and orders that:

**FINDINGS OF FACT**

1           1.       Comtel is a limited partnership organized under the laws of the State of Texas.  
2  
3 Comtel is a newly formed limited partnership who is engaged in the business of telecommunications.<sup>1</sup>

4           2.       VarTec and Excel are corporations organized under the laws of the State of Texas.  
5 VarTec Solutions, which formerly operated under the corporate names eMeritus Communications,  
6 Inc., Teleglobe Business Solutions, Inc., and Telco Holdings, Inc., d/b/a Dial & Save, is a Delaware  
7 Corporation.

8           3.       VarTec was granted authority to provide competitive intraLATA and interLATA  
9 resold telecommunications in Arizona in Commission Decision No. 62238 (January 12, 2000).  
10 Additionally, in Commission Decision No. 65203 (September 20, 2002) VarTec was granted  
11 authority to provide competitive facilities-based and resold local exchange and exchange access  
12 telecommunications services in Arizona.

13          4.       In Commission Decision No. 65470 (December 19, 2002) Excel received Commission  
14 approval to provide resold interexchange telecommunications services and competitive facilities-  
15 based and resold local exchange services.

16          5.       VarTec Solutions, operating under its former corporate name, eMeritus  
17 Communications, Inc., received Commission authority to provide competitive resold interexchange  
18 telecommunications services in Decision No. 66640 (December 18, 2003).

19          6.       On November 1, 2004, the VarTec Companies voluntarily filed for Chapter 11  
20 bankruptcy, and as a part of the bankruptcy process, the VarTec Companies entered into an asset  
21 purchase agreement with Comtel Investments, LLC ("Comtel Investments"), which was approved by  
22 the Court on July 27, 2005. On August 1, 2005, Comtel Investments, which is wholly owned by the  
23 same parties who own and control Comtel, assigned its rights and obligations under the asset  
24 purchase agreement to Comtel. The asset purchase agreement was executed on July 25, 2005, and  
25 was approved by the Court on July 27, 2005.

26          7.       Comtel's newly formed partnership is comprised of former management members

27 <sup>1</sup> Comtel Assets, Inc., is Comtel's general partner and owns one percent of the equity of Comtel. Comtel's limited  
28 partner, Comtel Assets Corporation, owns 85.70 percent of the equity in Comtel and the Management Voting Interest  
holds 13.3 percent of equity in Comtel.

1 from the VarTec companies and its own management employees. According to Staff's Report, the  
2 five management members of Comtel have more than 80 years combined experience in the  
3 telecommunications industry.

4 8. On September 23, 2005, Applicants filed an application with the Commission for  
5 approval of the acquisition of certain of the VarTec Companies' assets by Comtel.

6 9. On March 17, 2006, the VarTec companies provided notice via First Class mail to its  
7 customers of the transfer of assets to Comtel.

8 10. On May 16, 2006, Applicants filed a Supplement to Joint Application for Approval of  
9 a Transfer of Assets which provided additional information on Comtel's application for a CC&N.

10 11. On August 14, 2006, a full public hearing was held as scheduled.

11 12. At hearing, Comtel's witness indicated that Comtel is seeking Commission approval  
12 for the following:

- 13 a. To transfer VarTec's customer base to Comtel and to cancel if needed,  
14 VarTec's CC&N in Arizona;
- 15 b. A CC&N to provide statewide competitive resold local exchange and access  
16 services, statewide competitive resold interexchange services, statewide  
17 competitive facilities-based and local services and access services;
- 18 c. To adopt the existing tariffs on file for VarTec companies, which include  
19 VarTec Telcom, VarTec Solutions and Excel, by changing the name on the  
20 existing tariff to reflect current ownership by Comtel;
- 21 d. To transfer the existing performance bonds required to be in place for the  
22 VarTec companies to Comtel in the amount of \$135,000 and authority to  
23 cancel any excess bonds that are in place;
- 24 e. To operate under the trade names of VarTec Telcom, VarTec Solutions, Excel  
25 Telecommunications and Clear Choice Communications, as well as Comtel  
26 Telcom; and
- 27 e. To waive the Slamming and Cramming rules for this transaction.

28 13. Staff recommends approval of the acquisition of the VarTec Companies' assets by

1 Comtel and that Comtel be granted a CC&N to provide resold and facilities-based local exchange  
2 service and resold interexchange service.

3 14. Staff also recommends that current VarTec Companies' customers have 90 days  
4 following the date of the Commission's order to transfer to another carrier without prejudice or  
5 regard to contractual obligation.

6 15. At hearing, Comtel's witness indicated that Comtel disagrees with Staff's  
7 recommendation regarding the 90-day opt out provision. The witness indicated that the 90 day  
8 window was not necessary because customers were given notice in March 2006 regarding the transfer  
9 of service to Comtel, there have not been any requests for a change in service by customers, Comtel  
10 is more financially stable than VarTec and the addition of the provision would discourage  
11 entrepreneurs from investing in further deals such as this one. (Tr. Pg. 32, lines 1-25 and Pg. 33, lines  
12 1-24)

13 16. Comtel's witness further testified that the company has received Commission approval  
14 in 49 states and the District of Columbia and those Commissions have not required a 90-day opt out  
15 requirement. Additionally, Comtel's witness stated that its residential local and long distance  
16 customers are month-to-month and do not have contracts and are free to terminate service at any  
17 time. However, the witness testified that approximately 327 business and 133 wireless customers  
18 could be affected by Staff's recommendation. (Tr. Pg. 34 lines 1-25)

19 17. Staff's witness indicated at hearing that the basis for Staff's 90-day opt out  
20 recommendation was to give customers the ability to choose who they wanted to do business with  
21 and not by default through a transfer of customer base.

22 18. In response to the company's assertion that the 90-day opt out provision would act as a  
23 deterrent to future investors, Staff pointed out that buyers usually take into account when they are  
24 purchasing assets such as this one, the potential loss of customers when they are negotiating price.  
25 Additionally, Staff indicated that in previous Commission decisions involving the transfer of assets or  
26 customers, the 90-day out provision was required.

27 19. At hearing, Staff's witness further clarified that the 90-day opt out recommendation  
28 would only apply to customers who had term contracts.

1        20.        We find Staff's recommendation regarding the 90-day opt out provision reasonable.

2        21.        According to the Applicant's joint application, Comtel will initially mirror the services  
3 and charges of VarTec. At hearing, Comtel's witness indicated that the goal will be to continue all  
4 residential services currently under the VarTec brand name, but as the company begins to offer new  
5 products and services those items will be marketed under the Excel brand and eventually the charges  
6 and tariffs will need to be modified to reflect the new products. (Tr. Pg. 37 lines 7-25 and Pg. 38 lines  
7 1-3)

8        22.        According to Staff's Report, prior to the close of the purchase asset agreement, Comtel  
9 reported assets of \$43.5 million and partner's capital of \$43.5 million. At closing, the partnership  
10 was to pay the seller \$40.5 million.

11       23.        By Procedural Order on August 16, 2006, the Applicants were directed to file updated  
12 audited balance sheets for Comtel and to docket notice of the filing. On August 23, 2006, Comtel  
13 filed a letter in this docket stating that because Comtel Assets, Inc., and Comtel Assets Corporation,  
14 the general and limited partners for Comtel, are not engaged in business activities, they do not  
15 produce financial statements and that the companies "simply act as partners for the operational  
16 company, Comtel". Applicants also stated that the majority shareholder of Comtel, Sowood  
17 Commodity Partners Fund III LP ("Sowood") is privately held, and their financial statements are  
18 private and therefore Comtel does not have access to them.

19       24.        In its post hearing filings, the Applicant docketed updated unaudited financial  
20 statements for Comtel Telcom Assets, L.P., for the period of July 2005 through June 30, 2006.  
21 Comtel's balance sheet statement shows total assets of \$105,650 and partner's capital of \$36,740,  
22 with total assets of \$108,725. The post hearing filing reflects the acquisition of the assets of VarTec  
23 Telecom, Inc., VarTec Solutions, Inc., and Excel Telecommunications, Inc.

24       25.        On September 21, 2006, Staff filed a Notice stating that based on Comtel's updated  
25 balance sheets, Staff believes Comtel has the financial stability to provide telecommunications  
26 service in Arizona.

27       26.        The Commission's bond requirements are \$10,000 for resold long distance, \$25,000  
28 for resold local exchange and \$100,000 for facilities-based local exchange services. According to

1 Staff's Report, VarTec Telecom currently has a \$125,000 performance bond, Excel has a \$135,000  
2 performance and VarTec Solutions has a \$10,000 license and permit bond on file with the  
3 Commission. Staff recommended that because one entity, Comtel, will remain after the transaction is  
4 completed, that Comtel should be required to procure a \$135,000 performance bond.

5 27. Comtel has requested a waiver of the Slamming and Cramming rules for this  
6 transaction. According to Staff's Report, on March 17, 2006, the VarTec Companies provided notice  
7 via first class mail of the acquisition of VarTec assets by Comtel. Staff's Report notes that Comtel  
8 believes it would be impractical and burdensome to obtain from each customer their consent to  
9 transfer service to Comtel and that such authorizations would hinder the seamless transition of  
10 services. Staff concluded that because VarTec's notice informed customers that the rates, terms and  
11 conditions of service would not change as a result of the transfer of assets and informed customers  
12 that they may subscribe to a telecommunications service provider of their choice, Staff believes the  
13 Commission's Slamming and Cramming rules should be waived for this transaction.

14 28. At hearing, Comtel's witness testified that Comtel began doing business on June 7,  
15 2006, in 49 states and the District of Columbia and that Comtel and Qwest have executed the Qwest  
16 Platform Master Service Agreement. (Tr. Pg. 21 lines 9-16)

17 29. Comtel's witness indicated that she believed it was the intent of the company's  
18 shareholders to grow both the commercial and residential side of the telecommunications business in  
19 Arizona and that they intended to be a robust competitor in Arizona. (Tr. Pg. 64, lines 20-25, and Pg.  
20 65 lines 1-16)

21 30. Staff recommends the cancellation of the VarTec companies' CC&Ns to provide  
22 telecommunications services in the State of Arizona and approval of Comtel's request to waive the  
23 Commission's Slamming and Cramming rules for this transaction.

24 31. Staff further recommends:

25 (a) That the Applicant comply with all Commission Rules, Orders and other  
26 requirements relevant to the provision of the intrastate telecommunications  
27 services;

28 (b) That Applicant abide by the quality of service standards that were approved by



the Commission for Qwest in Docket No. T-0105B-93-0183;

- (c) That Applicant be prohibited from barring access to alternative local exchange service providers who wish to serve areas where the Applicant is the only provider of local exchange service facilities;
- (d) That Applicant be required to notify the Commission immediately upon changes to the Applicant's name, address or telephone number;
- (e) That Applicant cooperate with the Commission investigations including, but not limited to customer complaints;
- (f) That Applicant offer Caller ID with the capability to toggle between blocking and unblocking the transmission of the telephone number at no charge;
- (g) That Applicant offer Last Call Return service that will not return calls to telephone numbers that the privacy indicator activated; and
- (h) That the Commission authorize Applicant to discount its rates and service charges to the marginal cost of providing the services.

32. Staff also recommends that Applicant comply with the following items and if Applicant fails to do so, the Applicant's CC&N shall be considered null and void after due process.

The Applicant shall:

- (a) Procure a performance bond equal to \$135,000. The minimum bond amount of \$135,000 should be increased if at any time it would be insufficient to cover advances, deposits, and/or prepayments collected from the Applicant's customers. The bond amount should be increased in increments of \$67,500. This increase should occur when the total amount of the advances, deposits, and prepayments is within \$13,500 on the bond amount.
- (b) Docket proof of the performance bond, as a compliance item in this docket, within 365 days of the effective date of an Order in this matter or 30 days prior to the provision of service, whichever comes first. The performance bond must remain in effect until further order of the Commission.
- (c) If at some time in the future the Applicant does not collect advances, deposits



1 and/or prepayments from its customers, Staff recommends that the Applicant  
2 be allowed to file a request for cancellation of its established performance  
3 bond regarding its resold services. Such request must reference the decision in  
4 this docket and must explain the Applicant's plans for canceling those portions  
5 of the bond.

6 33. Staff's recommendations as set forth herein are reasonable and should be adopted,  
7 except that we will allow Comtel to exercise discretion in procuring either a performance bond or an  
8 irrevocable sight draft Letter of Credit in the amount of \$135,000.

9 **CONCLUSIONS OF LAW**

10 1. Applicants are public service corporations within the meaning of Article XV of the  
11 Arizona Constitution and A. R. S. §§ 40-281 and 40-282.

12 2. The Commission has jurisdiction over the Applicants and the subject matter of the  
13 application.

14 3. Notice of the application was given in accordance with the law.

15 4. Acquisition of VarTec Companies' assets by Comtel is in the public interest.

16 5. The cancellation of the VarTec companies' CC&Ns to provide telecommunications  
17 services and the waiver of the Commission's Slamming and Cramming rules in regards to this  
18 transaction is in the public interest.

19 6. Comtel is a fit and proper entity to receive a CC&N as conditioned herein for  
20 providing resold and facilities based local exchange service and resold interexchange services in the  
21 State of Arizona.

22 7. Staff's recommendations, as set forth above, are reasonable and should be adopted  
23 except as provided in Finding of Fact No. 33.

24 **ORDER**

25 IT IS THEREFORE ORDERED that the joint application of Comtel Telecom Assets LP,  
26 VarTec Telecom, Inc., Excel Telecommunications and VarTec Solutions for approval of the transfer  
27 of VarTec's assets to Comtel Telecom Assets LP, and for approval of a Certificate of Convenience  
28 and Necessity to Comtel to provide resold and facilities-based local exchange service and resold

1 interexchange service is hereby, granted conditioned upon compliance with the requirements set forth  
2 in Findings of Facts Nos. 30, 31, 32 and 33 above and the following ordering paragraphs.

3 IT IS FURTHER ORDERED that the Certificates of Convenience and Necessity held by  
4 VarTec Telcom, Inc., Excel Telecommunications and VarTec Solutions, to provide  
5 telecommunications services in the State of Arizona are hereby cancelled.

6 IT IS FURTHER ORDERED that Comtel Telcom Assets LP, shall within 30 days of the date  
7 of this Decision provide notice to VarTec Companies customers, with term contracts, that they have  
8 90 days from the date of Comtel Telcom Assets LP's notice, of their intent to transfer to another  
9 carrier without prejudice or regard to contractual obligation.

10 IT IS FURTHER ORDERED that Comtel Telcom Assets LP shall procure either a  
11 performance bond equal to \$135,000, or an irrevocable sight draft Letter of Credit in a form  
12 acceptable to Staff and in the amount of \$135,000, and file the original bond or letter with the  
13 Commission's Business Office and copies of the bond or letter with Docket Control, as a compliance  
14 item in this docket, within 365 days of the effective date of this Decision or 30 days before providing  
15 service, whichever, comes first.

16 IT IS FURTHER ORDERED that Comtel Telcom Assets LP, shall be granted authority to  
17 cancel any excess bonds, beyond the \$135,000 performance bond stated above, that may be in place  
18 for the VarTec companies.

19 IT IS FURTHER ORDERED that if at some future date, Comtel Telcom Assets LP, does not  
20 collect advances, deposits and/or prepayments from its customers, Comtel Telcom Assets LP, shall  
21 file a request for cancellation of its established performance bond or irrevocable sight draft Letter of  
22 Credit regarding its resold services and such request shall reference the Decision in this docket and  
23 must explain Comtel Telcom Assets LP's plans for canceling those portions of the bond or Letter of  
24 Credit.

25 IT IS FURTHER ORDERED that Comtel Telcom Assets LP, shall be granted a limited  
26 waiver of the Commission's Slamming and Cramming rules, pursuant to A.A.C R14-2-1901 *et seq.*,  
27 for the purposes of transferring customers as a result of this transaction.

28 IT IS FURTHER ORDERED that Comtel Telcom Assets LP, may operate under the trade

names of VarTec Telecom, VarTec Solutions, Excel Telecommunications and Clear Choice Communications.

IT IS FURTHER ORDERED that if Comtel Telecom Assets LP fails to comply with the ordering paragraphs set forth above within the time specified the Certificate of Convenience and Necessity conditionally granted herein shall be considered null and void after due process.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

*Jeffrey M. Hatch-Miller*  
CHAIRMAN

*W. H. Hall*  
COMMISSIONER

*Samuel Blum*  
COMMISSIONER

*R. M. Bingham*  
COMMISSIONER

*B. C. McNeil*  
COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 5<sup>th</sup> day of Dec., 2006.

*Brian C. McNeil*  
BRIAN C. McNEIL  
EXECUTIVE DIRECTOR

DISSENT \_\_\_\_\_

DISSENT \_\_\_\_\_

1 SERVICE LIST FOR:

COMTEL TELCOM ASSETS LP, VARTEC  
TELECOM, INC., EXCEL  
TELECOMMUNICATIONS, INC., AND VARTEC  
SOLUTIONS, INC.,

4 DOCKET NOS.:

T-20423A-05-0677, T-03401A-05-0677, T-02584A-05-  
0677 and T-03188A-05-0677

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